FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 7 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO. 423

SHAWKEE MANUFACTURING COMPANY,
GLENSHAW GLASS COMPANY,
McKEE GLASS COMPANY and
GEORGE R. HAUB

v.

HARTFORD-EMPIRE COMPANY.

On Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit.

PETITION FOR REHEARING

WALTER J. BILENKO,
Attorney for Hartford-Empire Company.

FRANCIS W. COLE,
EDGAR J. GOODRICH,
Of Counsel.

June, 1944.

SMITH BROS. & REG., LAW PRINTERS, 435-437 BOULEVARD OF ALLIES, PITTSBURGH, PA.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO. 423

SHAWKEE MANUFACTURING COMPANY,
GLENSHAW GLASS COMPANY,
McKEE GLASS COMPANY and
GEORGE R. HAUB

v.

HARTFORD-EMPIRE COMPANY.

On Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit.

PETITION FOR REHEARING

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Hartford-Empire Company respectfully petitions for a rehearing of this case, upon the following grounds:

1. For the reasons set out in the petition for rehearing being filed this day in the companion case at No. 398, we submit that Hartford is entitled to a rehearing in this case as well.

2. The Court of Appeals, prior to its decision in the Shawkee infringement case, knew the genesis of the Clarke article and that Hartford had brought about its publication and thereafter presented it to the Patent Office. Shawkee's counsel attributed the article to Hatch and its publication to Hartford when they laid the matter before that court. Hartford made no denial; these matters stood *undisputed*. Moreover, Hartford's counsel wrote to the senior judge of the Court of Appeals, after the matter had been called to its attention, expressing willingness that the court consider the documents submitted by Shawkee as a part of the record in the case (R. 24; see also Hazel record, pp. 73-87). In that state of the record, the Court of Appeals unanimously affirmed the District Court and unanimously denied rehearing. It thus expressed its opinion that its judgment had not been procured by fraud, a conclusion confirmed years later by the Court of Appeals in this proceeding.

For the reasons stated in the dissenting opinion of Mr. Justice Roberts at No. 398, we submit that additional evidence could have been obtained by Shawkee by the exercise of even the slightest diligence, but in any case, having in mind that initial authorship and publication were *undisputed* in the Court of Appeals, the only material new evidence made available to Shawkee by the anti-trust proceedings in 1941 went to the questions of (a) reasons for the preparation of the article, (b) alleged suppression of a full disclosure by Clarke after the Court of Appeals' decision in the Hazel infringement case, and (c) the payment of money to Clarke. As to all of these matters, there are real and, we believe, control-

ling disputes, as set out in our companion petition at No. 398.

This Court holds (Opinion p. 2) that when Shawkee charged "deceptive authorship" of the article, "honest dealing with the Court required that Hartford should make a full disclosure of its fraudulent conspiracy". But, we submit, there was no such burden unless Hartford was conscious of the existence of a "fraudulent conspiracy"; authorship and publication stood agreed, and the other, and vitalizing, elements of the "conspiracy" are genuinely believed by Hartford to be nonexistent. That is why Hartford wants the issue to be tried.

Moreover, prior to the decision of the Court of Appeals in the Shawkee infringement suit, Shawkee's counsel had requested dismissal of the suit under the doctrine of the *Keystone Driller* case (Hazel record, pp. 85-6). They urged it again without success in a petition for rehearing (R. 27, R. 76). Therefore, insofar as Shawkee is concerned, the present decision of this Court is in reality no more than a review of the judgment of the court below in a proceeding had at a term now ten years past, and is therefore improper.

In view of this Court's assurance (Hazel opinion, p. 9, footnote 5) that there will be no final determination without examination and cross-examination of witnesses in the existence of a dispute, there should be no summary disposition of the Shawkee case as contemplated by the present opinion. The disputed facts set out in our companion petition at No. 398 are fundamental to the decision in the case at bar.

Since the matters stated in our companion petition at No. 398 are also relied on here, copies of that petition will be served on counsel for Shawkee.

Respectfully submitted,

HARTFORD-EMPIRE COMPANY

By WALTER J. BLENKO,
Its Attorney.

FRANCIS W. COLE,
EDGAR J. GOODRICH,
Of Counsel.

CERTIFICATE OF COUNSEL

I certify that the foregoing petition is presented in good faith and not for delay.

EDGAR J. GOODRICH,
Of Counsel for Hartford-Empire Company.

June, 1944.

SUPREME COURT OF THE UNITED STATES.

No. 423.—October Term, 1943.

Shawkee Manufacturing Company, Glenshaw Glass Company, McKee Glass Company, George R. Haub, Petitioners,
vs.
Hartford-Empire Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[May 15, 1944.]

Mr. Justice Black delivered the opinion of the Court.

Here as in *Hazel-Atlas Glass Company* v. *Hartford-Empire Company*, No. 398, decided today, the Circuit Court of Appeals for the Third Circuit has declined to set aside judgments entered at a prior term. 137 F. 2d 764. Both this case and the *Hazel-Atlas* case involve the validity of judgments obtained by Hartford-Empire adjudicating infringement of the "gob feeding" patent No. 1,655,391 owned by Hartford. In the *Hazel-Atlas* case, *supra*, we have held Hartford's proven frauds in connection with obtaining and enforcing that patent were of such nature that the decree of infringement against Hazel-Atlas should be set aside, and have directed that appropriate orders be entered to accomplish that purpose. Nevertheless, it is argued that the decrees rendered against Shawkee and others should be allowed to stand because of certain differences between their situation and that of Hazel-Atlas. These are the differentiating facts:

Hartford's infringement suit against Shawkee and the other petitioners was not begun until 1933 after the decision of the Third Circuit Court of Appeals the previous year holding Hartford's "gob feeding" patent valid and infringed by Hazel-Atlas. The District Court, having been reversed by that previous decision, held Shawkee and the others guilty of infringement. On appeal to the Third Circuit Court of Appeals, that court did not again quote from the spurious Clarke article but, like the District Court, simply held in favor of Hartford on the authority of the 1932 decision. 68 F. 2d 726. While the appeal was pending final disposition in the Circuit Court, Shawkee's counsel communicated

with Judge Buffington charging that the Clarke article was spurious; but at that time Shawkee had no direct proof of its charge. That proof, as pointed out in our *Hazel-Atlas* opinion, *supra*, was available only after the United States offered its evidence in the anti-trust suit in 1941.

None of these facts, we think, should deprive Shawkee and the others of relief against Hartford's fraudulent conduct. To obtain its judgment against them, Hartford successfully used the judgment against Hazel-Atlas without disclosing its previous misconduct. *Keystone Co.* v. *Excavator Co.*, 290 U. S. 240, 246-247. Hartford can derive no aid from the fact that Shawkee reported to the Circuit Court its belief as to the deceptive authorship of the Clarke article. With that charge on the record, honest dealing with the Court required that Hartford should make a full disclosure of its fraudulent conspiracy. Its failure to do so under these circumstances aggravated the previous deception it had practiced on the Patent Office and the courts.

The prayer for relief of Shawkee and the others was that the court adjudge that Hartford did not come into court with clean hands, and that they be fully freed from further obligations under the judgments against them. This relief should be granted. They further prayed that a master be appointed by the Circuit Court of Appeals to render an accounting of costs incurred in these and former proceedings, moneys paid by them to Hartford pursuant to the challenged judgments, and damages sustained by them because of Hartford's unlawful use of its patent. Whether this type of relief will be granted must depend upon further proceedings in the District Court which entered the judgment of infringement.

The judgment of the Circuit Court of Appeals is reversed. The cause is remanded to it with directions to set aside its 1934 judgment, recall the mandate, and dismiss the appeal; and issue mandate to the District Court with directions to set aside its judgment finding Hartford's patent valid and infringed, deny Hartford all relief against infringement of this patent, and permit Shawkee and the others to bring such further proceedings as may be appropriate in accordance with their prayer for relief.

It is so ordered.

Mr. Justice ROBERTS.

For the reasons given in my dissent in Number 398, *Hazel-Atlas Glass Company* v. *Hartford-Empire Company*, I think that the decree should be reversed and the cause remanded, with directions to the court below to grant the petitioners leave to file a bill of review in the District Court.

Mr. Justice REED and Mr. Justice FRANKFURTER join in this opinion.

The CHIEF JUSTICE agrees with the result suggested in this dissent.